Supreme Court, U.S.
FILED
SEP 07 2010
OFFICE OF THE CLERK

No. 09-1541

IN THE
SUPREME COURT OF THE UNITED STATES

VIETNAM VETERANS OF AMERICA AND
VETERANS OF MODERN WARFARE,
Petitioners,

v.

ERIC K. SHINSEKI, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF THE DEPARTMENT OF
VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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September 7, 2010

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ARGUMENT

Respondent Secretary of the Department of Veterans Affairs (hereinafter the "VA"), like the D.C. Circuit, confuses "individual *relief*" with "individual *review*." In so doing, both the VA and the D.C. Circuit misapply this Court's associational standing decisions to reach a result that conflicts with those decisions.

The VA asserts that Petitioners do not have standing because they have not asked for review of any individual decision to grant or deny benefits *on the merits*. As the pleadings make clear, however, Petitioners seek injunctive relief for each of their members who, individually, suffer from the VA's chronic delays in reaching *any* decision. The relief Petitioners seek is simply that a prompt decision be made in each of their members' cases (whatever the outcome on the merits). The unreasonable delay in the issuance of those individual decisions is the basis of Petitioners' claims, and those claims will be redressed if the prompt issuance of a decision is ordered by the courts. Petitioners therefore have standing to assert such claims.

In addition to the important issue of associational standing raised in this appeal, there are three other compelling reasons why review should be granted:

First, the ruling that Congress stripped the Article III courts of the power to hear constitutional claims raised by veterans when it enacted 38 U.S.C. § 511 conflicts with this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974).

Second, the importance of review by this Court – and the need for that review to happen now – is

demonstrated by the unbroken line of decisions by the Court of Appeals for Veteran's Claims ("CAVC") over the last twenty years. Despite worsening delays, the CAVC has utterly failed to provide any relief whatsoever to address the violations of constitutional due process pervasive in the VA's disability benefits system.

Third, even assuming the CAVC provides a capable and constitutionally appropriate forum for addressing some claims in certain limited circumstances, Petitioners here are jurisdictionally barred from bringing their claims before that court, and must accordingly rely exclusively on the Article III courts to obtain relief on behalf of their members. The D.C. Circuit's opinion, however, forecloses access to those courts and creates a Catch-22 that effectively bars any judicial review of the VA's systemic delays.

A. Petitioners Have Standing

In order to demonstrate associational standing, Petitioners must show that at least one of their members is "suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977). Petitioners' Complaint and the supporting declarations of their members alleged such injury by highlighting the delays suffered by individual declarants and by asserting that similar delays are true for many other members. *See* Pet. App. 47 (declarant Bobby O'Daniel alleges ongoing delay of 14 months at the time of declaration); Pet. App. 49 (declarant Keith King alleges ongoing delay of 14

months at the time of declaration); Pet. App. 53 (declarant Donald Overton alleges ongoing delays of more than five years); Pet. App. 59 (declarant Richard Weidman alleges ongoing delays of more than ten years). Petitioners also prayed for injunctive relief that would redress each individual member's injury.

While it is true that Petitioners did not request relief that would mandate a particular decision or outcome in any individual's case, they most assuredly did request relief that would benefit each individual member suffering unconstitutional delay: an order requiring that the VA reach *some* decision in each individual's case within a reasonable amount of time, so that those individuals can then either begin receiving help or at least be entitled to an appeal. The Court of Appeals and the VA ignored the individual nature of the relief sought, and thus failed to follow the standing analysis for an association mandated by *Hunt*, 432 U.S. at 342-43.

By requesting relief benefiting each of their members who suffer delays past certain maximum thresholds (whether it be 90 days after an initial application and 180 days for appeal, as sought in the Complaint, or some other maximums set by the District Court after further proceedings), Petitioners carefully followed the principles established by this Court that associations not assert claims that require the individual *participation* of each injured party. *Hunt*, 432 U.S. at 343. But Petitioners indisputably request relief that will *benefit* each individual. Petitioners' reference to average delays merely demonstrates the extent of the constitutional violations rampant throughout the VA's system; it

does not, as the VA would have it, suggest the absence of individual harm.

As even the VA acknowledges, Br. in Opp. at 8, Petitioners included the declarations of individuals who averred *specific* delays suffered by Petitioners' members. Those members will individually benefit from the relief sought for them. For example, the requested relief would provide immediate and individual relief – a decision on his claim – for Keith King, who averred that his benefits claim has been pending without a decision for 14 months. Pet. App. 49. Petitioners' requested injunction likewise would provide immediate and individual relief to each of those members of Veterans of Modern Warfare referenced in Donald Overton's declaration, Pet. App. 53-54, who have been forced to endure delays in excess of 180 days in the resolution of their appeals. The same is true with respect to those veterans cited in Richard Weidman's declaration, Pet. App. 59, who have been waiting for decision on their appeals for *more than ten years*.

The VA concedes that an association has standing under *Hunt*, 432 U.S. at 342-343 when "at least one member would have standing to sue in his own right," and that a member has standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), when the member has suffered a "concrete and particularized" injury that would be "redressed by a favorable decision." Br. in Opp. at 6. This is a relatively uncomplicated inquiry, particularly at the motion to dismiss stage. *Lujan*, 504 U.S. at 561; *see Veterans for Common Sense v. Nicholson*, 2008 WL 114919, at *2-*3 (N.D. Cal. Jan. 10, 2009) (denying VA's motion to dismiss for lack of standing based on

plaintiff's general allegations "that their organizations are comprised of veterans, including many who have claims pending before the VA or the BVA . . . ."), *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, 1077 (N.D. Cal. 2008) *("Peake")* (after a trial on the merits, holding that plaintiffs' members had faced significant delays with "dire consequences," caused by the VA's conduct, which would be redressed by ordering the VA to issue benefits decisions within a reasonable time). Tellingly, on appeal to the Ninth Circuit, the VA did not challenge the district court's holding regarding standing, either in its brief or at oral argument. Brief for the Appellees, *Veterans for Common Sense v. Peake*, 08 16728 (9th Cir. filed April 11, 2008); Transcript of Oral Argument, *Veterans for Common Sense v. Peake*, 08 16728 (9th Cir. argued Aug. 12, 2009), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003827.

Petitioners here alleged in detail the injuries suffered by individual members as a result of the VA's failure to render a decision in a reasonable amount of time and proposed a meaningful way of redressing that injury through the injunctive relief requested. Under this Court's precedent in both *Hunt* and *Lujan*, Petitioners have demonstrated associational standing in this case. *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185-86 (2000) (where "a plaintiff . . . is injured . . . due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form

of redress" that is sufficient for associational standing).

The lower courts' failure to recognize that Petitioners have standing, in conflict with the decisions of this Court, is of course crucially important to the ability of Petitioners to obtain relief on their claims, and should be reviewed in full by this Court if it is not summarily reversed.

B. The Decisions Below Conflict with this Court's Precedent in *Johnson v. Robison* and Its Progeny

Nowhere in its response does the VA reference this Court's precedent in *Johnson v. Robison*. Instead, the VA asserts that Congress intended to restrict a veteran's ability to seek relief from constitutional violations to an extraordinary appellate writ request to the CAVC, and thus intended to deny Petitioners *any* access to the federal district courts, even in those instances where the Secretary has completely failed to act (as opposed to when a veteran disagrees with the substance of the action taken). The VA's position, like that of the Court of Appeals, cannot be reconciled with the explicit holding of this Court in *Johnson v. Robison*, 415 U.S. 361 (1974), or the cases that have followed it.

As a threshold matter, the District Court and the Court of Appeals ostensibly avoid facial conflict with this Court's holding in *Johnson v. Robison* by conflating the concept of the standing of an individual member of an association with the concept of jurisdiction to adjudicate that individual member's claim. This conflation masks the

important statutory and constitutional issues at the heart of this case: the scope of 38 U.S.C. § 511 and its constitutional limitations.

The VA contends that 38 U.S.C. § 511 precludes any individual veteran from seeking relief in an Article III court to address the violation of that veteran's constitutional due process rights caused by the VA's delays. But that argument presents the question of whether Congress, in enacting Section 511, intended to foreclose access to the federal district courts for all constitutional challenges.

Several courts have answered this question with a resounding "no." In *Robison*, this Court rejected the argument that Congress had stripped the federal district courts of the power to hear constitutional challenges involving the VA's benefits programs, holding that constitutional challenges implicate the most fundamental right to judicial review and that such review must be permissible in an Article III court. *Robison*, 415 U.S. at 368-69, 373. The D.C. Circuit properly applied and followed *Robison* in reaching the conclusion that Article III courts remain open to veterans raising constitutional challenges, especially in cases where the Secretary has failed to take any action. *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (holding that Article III courts "have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding"). Decisions of the Federal Circuit are similar. *See Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000) (Section 511(a)'s jurisdictional bar applies

only where there has been a "decision by the Secretary" involving "questions of law and fact necessary" to a formal decision regarding an individual veteran's benefits); *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005) ("Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a 'decision by the Secretary.'"). The Sixth Circuit, however, has held that Section 511(a) precludes federal district courts from exercising jurisdiction over a claim to compel VA action unreasonably and unconstitutionally delayed. *Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997). The Sixth Circuit's decision in *Beamon* cannot be reconciled with *Broudy*, *Bates*, and *Hanlin*. That conflict, along with the conflict of the Court of Appeals' decision with this Court's holding in *Robison*, calls for this Court's intervention.

C. The CAVC is Not an Adequate Alternate Forum Capable of Addressing Veterans' Constitutional Challenges

The VA's argument is also flawed as a practical matter. Opinion after opinion issued by the CAVC in mandamus cases demonstrates that the premise underlying the VA's argument is simply not true. The CAVC has proven utterly incapable of protecting veterans from the constitutional violations that infect the VA's disability benefits process, especially at the initial determination stage conducted in the Regional Offices.

For example, in *Pitts v. Shinseki*, David Pitts filed a petition for a writ of mandamus requesting the CAVC to order the VA simply to issue a decision

on his *initial* claim for benefits. 2009 WL 2031896, at *1 (Ct. Vet. App. July 15, 2009). Mr. Pitts sought benefits for a back injury he received in Vietnam, but his claim had languished due to a perceived lack of evidence that his injury was service connected. *Id.* The CAVC discussed the three conditions that must be met before the court would issue the writ. "(1) The petitioner must lack adequate alternative means to attain the desired relief, *thus ensuring that the writ is not used as a substitute for the appeals process*; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that the issuance of the writ is warranted." *Id.* at *2 (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004) (emphasis added).

The CAVC then denied Mr. Pitts' petition for mandamus relief because "the petitioner can appeal any adverse determination as to his Vietnam status *should one be made*." *Id.* (emphasis added). The CAVC went on to make clear it will refuse to address any argument regarding delays in the Regional Offices: "[n]o decision concerning petitioner's entitlement to DMH compensation has been made. *Any delay* in the adjudication of the petitioner's claim is not extraordinary and does not rise to the equivalent of an arbitrary refusal to act." *Id.* (emphasis added).

The CAVC thus acknowledged in *Pitts* the Catch-22 facing our Nation's disabled veterans: a veteran who alleges that the Regional Office has failed to act *must wait for the Regional Office to act* before seeking relief, and no writ of mandamus will issue

before then because "any delay . . . is not extraordinary." *Id.*

The futility of bringing a petition for a writ of mandamus for unreasonable delay before the CAVC is further illustrated by the hundreds of cases in which such mandamus relief was requested and denied. *See, e.g.*, *Hawkins v. Principi*, 18 Vet. App. 12 (2001) (denying mandamus relief where veteran had waited 18 years for a final decision); *Pehrson v. Nicholson*, 2007 WL 2301807 (Ct. Vet. App. July 31, 2007) (denying mandamus petition after two-year delay caused by the VA's failure simply *to transmit* the veteran's claims file to the appropriate Regional Office; "trust[ing] that the Secretary will continue to develop, and ultimately, adjudicate the petitioner's claims in an expeditious manner"); *Pehrson v. Mansfield*, 2007 WL 4105282 (Ct. Vet. App. Nov. 14, 2007) (admonishing counsel and threatening sanctions for bringing a second mandamus petition in the same case despite the fact that the Secretary had failed to provide a required medical examination). After a diligent and thorough review of hundreds of CAVC cases requesting relief from the VA's unreasonable delays, Petitioners have failed to find a *single instance* of the CAVC actually granting relief. Nor does the VA's brief to this Court cite such a case.

Indeed, despite the VA's assertions, the CAVC itself has said it does not have the authority to issue a writ of mandamus to a Regional Office if an initial determination has never been made by the VA. *Dacoron v. Brown*, 4 Vet. App. 115, 119 (1993).

Moreover, even if the CAVC were to spontaneously reverse course and begin to exercise

supervisory authority over Regional Offices on a case-by-case basis to force the VA to address the delays, the notion that this piecemeal approach would provide meaningful relief to Petitioners and their members is plainly illusory. The problem of delays in the VA's disability benefits system can only be solved on a more comprehensive basis, and this Court has recognized the unique and indispensable benefits of allowing an association, in a single case, to vindicate the interests of all. *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187 (1951). Critically, however, Petitioners, as veterans service organizations, are jurisdictionally barred from bringing any proceedings before the CAVC. *Peake*, 563 F. Supp. 2d at 1079. Forcing Petitioners' members to bring individual petitions for mandamus relief in the CAVC is not only futile, but also deprives Petitioners of the well-recognized benefits of associational standing.

Finally, it is equally illusory to suggest that the Court of Appeals for the Federal Circuit would ever be in a position to provide meaningful relief. As the CAVC expressed in *Dacoran*, the CAVC is an appellate court, and it disclaims original jurisdiction to hear constitutional challenges. *Dacoron*, 4 Vet. App. at 119. Under the VA's theory, no appellate court – whether it be an Article I or Article III court – would have original jurisdiction to hear a constitutional challenge concerning delays, especially at the Regional Office level. The theoretical opportunity to seek appellate review at the Federal Circuit provides no solace when, in the

first instance, no court below can even entertain a constitutional challenge.[1]

CONCLUSION

The practical result of the argument advanced by the VA in its brief in opposition is precisely what *Robison* and its progeny prohibit: the complete denial of an adequate forum for Petitioners' constitutional claims. This Court should grant review of that extraordinarily important – and constitutionally incorrect – assertion.

The petition for a writ of certiorari should be granted.

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[1] *See also Webster v. Doe*, 486 U.S. 592, 603-04 (1988); *Czerkies v. U.S. Dept. of Labor*, 73 F.3d 1435, 1441 (7th Cir. 1996) (discussing *Morozsan v. U.S.*, 852 F.2d 1469, 1474 (7th Cir. 1988)).

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